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Symposium Proceedings

Various Editors

SYMPOSIUM PROCEEDINGS

A hypothetical was presented by the moderator, Professor Henry H. Perritt, Jr., for the consideration of the panelists. The hypothetical and ensuing discussion is printed below.

Moderator (Professor Perritt): The hypothetical is this: A new President of the United States will be elected in November of this year and sometime between November and January that President-elect will have a task force or transition group which would have available to it the issue of the *Villanova Law Review* containing this symposium. With this information, the transition task force for the President-elect would, I think, draw the following inferences: First of all, I don't think anyone that you heard this afternoon made or tried to make a terribly compelling case for treating small business differently than any other business. We heard some panelists say that it's probably a good idea to have a good deal of regulation and legal intervention on the subject of the workplace, but you ought to have it with everybody not just big business. Others said, "Well, maybe it's not such a good idea to have it for *anybody*—no more big business than small business." So, there is not a very strong rationale, this hypothetical, transition task force would conclude, for treating small business differently from big business.

Second, the evidence suggests that the problems of workers are worse with small business than big business; Dr. Dunlop communicated to you the evidence that wages are lower, benefits are fewer, safety is worse and the illness rate is higher. Therefore, if you are concerned from the standpoint of policy about workers, you ought to be more concerned about small business than big business.

However, you heard from Mr. Kilberg that there is a problem. Small business cannot afford to comply with a lot of what we are doing now, particularly the more recent developments, whether judicial or legislative. You heard from Mr. Brown that under existing collective bargaining legal concepts, it can be very difficult even for collective bargaining to work with respect to small business. You heard from Mr. Mitchell that he would be concerned about the intrusion on property rights resulting from government regulation, but might be less concerned if we had a legal regime in which people could work things out for them-

selves and have contracts enforced. Finally, you heard from Dr. Droitsch that, though he agrees, I gather, there is a rationale for treating small business differently, as a practical matter, you can't do it. The government does not know how to do it in terms of enforcing regulations, and even if the government knew how, there's no way small business could understand what was required of it. So what we've got is a problem in terms of human needs that seems to call for a solution that sweeps more business under the regulatory umbrella; yet, we have a whole host of practical problems which suggest that we don't know how to do that.

This transition task force might—and let's suppose it does—recommend to the President-elect that he should recommend to the Congress—let's suppose that the President-elect won by a landslide so he also has a Congress that will do whatever he wants—that we ought to forget about the current regulatory approach, that we ought to re-read Dr. Dunlop's paper, "The Limits of Legal Compulsion," and recognize that the limits are greater than were once thought. However, we should not forget about the workplace or about the worker because that's not going to be acceptable public policy in light of what Mr. Brown and the Pope have said. And the only institution that we know about, this task force would say, which might be able to address this problem is the institution of collective bargaining.

Collective bargaining meets Mr. Mitchell's test to some degree in that it is a private arrangement, results in a contract that could be enforced and, thus, is less intrusive on property rights. Therefore, what the new administration would do is sweep away all of the regulations and do whatever is necessary to permit collective bargaining to function effectively in these industries and workplaces. And that might, as Mr. Brown suggests, require legislatively changing some Supreme Court decisions related to striker replacements and to successorship and, in my view, would require a substantial change in the boundary between the labor laws and the antitrust laws, so that a union like the Mine Workers could legally exert pressure on enterprises that undercut collectively bargained standards.

So, the question is: "Would that be a good thing or a bad thing?"

Mr. Kilberg: As to what we would tell President Bush?

Moderator: Or whomever.

Mr. Kilberg: I'll have to start as long as we've got the first issue resolved. I'm not sure I agree with some of the assumptions

that you made. I think that the evidence suggests that small employers pay less than large employers. Small employers have less in the way of fringe benefits than do large employers. Small employers have greater employment costs, I would suggest, than do larger employers. That is a function of size and scale. It doesn't seem to me that what necessarily follows is that there ought to be any change in the law with regard to organization of small business. If there are employees who work for small employers who, in fact, desire to be represented, then they have that right to be represented. No change in the law is going to alter the reality of organization or non-organization. There are small employers who have a union representation and small employers who do not have a union representation.

We've heard some numbers. What we haven't heard are differences in pay and benefits between small employers who are organized and large employers who are not organized. My guess is that you would find that small employers still have lower rates of pay and lower fringe benefits regardless of whether they are organized. The point I made in my presentation was that having your employees represented by the Teamsters does not necessarily mean that you have the master freight contract. That's a reality of size, and you don't change those realities with changes in law.

Insofar as small employers have other problems of compliance with the law, I think that is a function of education and, frankly, of enforcement. My only concern is that enforcement not become a "bet the farm" proposition—that small employers not be forced to face the substantial costs of jury litigation and the penalties that often come with it, that is, tort-like penalties, compensatory damages, punitive damages and the like. Thus, my advice to the President would be to concentrate on some of those things that Roland Droitsch suggested: a better means of education, better means of communication, better means of regulation, better regulation, clearer regulation; not amendment of laws relating to collective bargaining.

Moderator: Mr. Brown, Mr. Kilberg says you don't need any changes in the law for collective bargaining. But you say your problem is that you make a deal and then you can't find the employer against whom to enforce it.

Mr. Brown: Well, before we could go in to talk with the President, I wonder if Mr. Mitchell in his free market would get rid of section 8(b) and secondary boycott restraints, in which case, in

this economic environment, the small employers like us . . . . I might throw my hand in with that proposal because what those laws are are regulations or official legal constraints upon the ability of unions to operate. If you look at the mining industry, for example, we are mainly, in numbers, small employers. A five hundred employee unit is a big unit. If you will eliminate our hot cargo prohibitions and antitrust sanctions applying to purely bona fide labor issues—not to unions acting as covers for employer conspiracies, but bona fide labor disputes—in this environment, I think, at least the Mine Workers might do better.

Moderator: Mr. Mitchell, would you be willing to get rid of the prohibitions on secondary boycotts and our cargo agreements?

Mr. Mitchell: If I understand them correctly, then I don't think that there should be any. . . let me put it this way: I have to be convinced that there is an economic or moral rationale for limiting peoples' behavior so long as they are not encroaching upon other peoples' life, liberty or property. Thus, in each case, I would simply apply that general or natural rights principle. If the secondary boycotts and the hot cargo prohibitions, with which I am less familiar, are within that framework, then sure, like I said in my comments, the government should not try to harm unions nor should they try to assist them.

Moderator: Then we have some common ground between the Mine Workers and the philosophical Libertarians. One way in which collective bargaining could be made freer and more effective is to permit Earl Brown's union to confront a small employer—or employer of any size—who doesn't want to play ball with the collectively bargained standards. The employers who do want to play ball could be enlisted not to do business with those who don't want to play ball, which presumably would bring a good number of them to heel or at least get rid of them as problems.

Mr. Brown: I suggest that that is an alliance of expediency, however, and that in the long term, for all workers, government policy is never needed, pro-trade union or anti-trade union.

Moderator: Dr. Dunlop, do you have a comment on that or on anything else?

Dr. Dunlop: I stand in awe of your capacity to moderate.

On the basic issue that you raised, I must say, I think the fundamental problem that we've been talking about is very, very different. I am intrigued by following the course that Roland

Droitsch did not exactly mention, but I trust would be in keeping with the spirit of what he has to say.

I think it makes a great deal of difference how the government stands, how the Labor Department stands. How much money the government has for enforcement is important too. I want to break this down into two parts: First, what proportion of those resources does the government spend in a kind of educational demonstration, in that general kind of mode? Second, what proportion does the government spend according to established priorities? The question is: What does the Labor Department, which has now become largely a regulatory agency, do?

There was a day from 1913 until into the 1960's when the Labor Department was mainly a manpower training body and had, well, up to 1947, had the Conciliation Service, the Mediation Service. You could go back to issuing reports in labor disputes and so on. But since that period of time, it has become largely a regulatory agency. That is quite a proposition. Now, I do think that if you're going to be a regulatory agency, you must say, "In the next three years, on which of these things are we going to focus? In the next three years, which of all of the 140 pieces of legislation on our plate are the most pressing?" Maybe it doesn't fit the law, maybe it doesn't suit the Congress, but to do it well you are going to have to select four or five things and concentrate on those four or five. Nobody can enforce 140 laws and do it well. It's simply too much on your plate. The issue is one of strategy at this time in history—what are the half a dozen things that are most important?

Or maybe you pick by industry. You say, "In this industry, we'll work on this problem. In that industry, we'll work on another problem." And maybe your enforcers have got to be more versatile. The wage and hour guys go out and all they do is play ball on the overtime issue because there is a lot of money in overtime. Forget that. Instead, say, "Let's go out and go to work on OSHA in this kind of industry. Let's go work on something else in that one." The whole strategy should involve how the Department utilizes its resources and spends its money. When you decide to put more of it into education and demonstration, into working with trade associations or working with unions and trade associations together, that is the kind of overall, 140-law strategy of enforcement that you must have. Otherwise, the way you're going, you'll never get there.

Mr. Brown: Dr. Droitsch, why haven't you done that already? Why wait till January 1989?

Dr. Droitsch: I say, "Amen." As you were saying that I was thinking about the sheepherder wage regulation that I was working on which . . .

Moderator: Sheepherder wage regulation?

Dr. Dunlop: Well, there used to be a big problem concerning the importation of sheepherders from Spain. The northwestern part of the United States never had—I think it was Montana—never had enough sheepherders, and the regulation addressed under what circumstances foreign sheepherders would be let in. Is that your problem?

Dr. Droitsch: No. It's the substance of what is called the adverse effect wage rate in the trade, but your point is well taken. In fact, I think that's critical if the Department is going to function efficiently. We have to sort out at the top some of the priorities that are pressing. The other ones we simply have to put aside for awhile. That is a process which really hasn't taken place. I think it is fairly critical. I tried to estimate, in terms of the Department, what percentage of the employees are involved in enforcement. If you take the direct numbers of people that are involved with enforcement and then prorate the administrative structure of the Department to that, well over fifty, perhaps as high as eighty percent of the Department is involved in enforcement. But still, in terms of doing the job that's theoretically out there, there is no way that that can be accomplished. We still have to be very, very selective. It comes down to questions of health and safety, death—major issues that we have to leverage in terms of the important matters as opposed to the Mickey Mouse.

Mr. Brown: Dr. Droitsch, if you will get the government to have a pro-trade union policy, we can help you enforce these regulations. You will not be burdened and you can focus on those things where there is no union, like sheepherders. (But there might be a sheepherders' union).

Dr. Dunlop: There is. The union opposes the mechanical device that shears sheep.

Mr. Brown: But I mean collective bargaining is an effective enforcement institution. For example, in coal mining and MSHA, you can directly correlate union mines with lower fatalities.

Dr. Dunlop: Let's put this question to you. What kind of a deal can we make to get the Mine Workers . . . . A number of these issues are different, but this is one where you ought to be

able to get the Mine Workers' Union and the coal mining industry together and ask, "What can you fellows do together to enhance the enforcement of MSHA?" To keep people from being killed is a very acceptable kind of conduct, I suppose. The issue is what can these parties do together to improve this. Now it operates partly by union committees. It operates in part by the union calling in OSHA inspectors. The union has the authority, under the contract, to shut down a mine and thereby to exercise a management function on grounds of safety. If it's abused, there is a provision we worked out way back in the forties providing that you may be disciplined for exercising the right to shut a mine in an inappropriate way. But *there* is a place where MSHA and collective bargaining can supplement each other. I felt for a long time that if they could get together, MSHA and the mine union and the mine industry ought to be able to do a more efficient job in lowering costs and reducing accidents. Has anybody ever pinned you down on this issue?

Dr. Droitsch: I think that's a good idea, but I would caution one area in terms of the hypothetical that I think is quite . . . .

Dr. Dunlop: That's what your job is—to caution only. Go ahead.

Dr. Droitsch: I commend to everyone's reading something as complicated as MSHA's ventilation standard. I want to note just how difficult it is to understand the wind and ventilation flows. In fact, in MSHA, we have a model that is kind of fun. You push the little levers down and the smoke goes through and you see what happens. If you think it's a simple issue, wow, this model demonstrates that it is an extremely complicated thing. Then once you know what you have to do to develop a regulation around it, it becomes even more complicated.

Dr. Dunlop: Well, all the more reason for leaving it to the parties.

Mr. Brown: The only people who understand it are either coal miners, or coal operators or former coal miners who worked for MSHA. No A.L.J. ever understood it.

Dr. Droitsch: This is true.

Mr. Brown: That's why you have to build those things as exhibits and say, "Judge, if smoke comes in here, it will go out there."

Dr. Droitsch: But in terms of sitting down, collective bargaining law around a table, this must be replicated around the country, unless it is done on a fairly large group, where all the

mine workers are represented. In other words, there are certain efficiencies of scale. If it's done locally, you are not going to get anywhere.

Mr. Kilberg: Well, I don't know about that. In the early part of the Reagan administration, I represented an employer who was affected by the lead standard. We got together with the Steelworkers and with OSHA and we had a tripartite group of industrial hygienists go through each plant with engineers. All we asked the OSHA person to do was to try to be quiet and allow the company and the union to agree—not on what the ultimate objective was; the government set the ultimate objective. We had spent a few years litigating it. Frankly, nobody was getting anywhere. What we then had to agree to was the rate at which we would progress to that ultimate objective at each plant, how we would progress, what engineering controls would go into effect, what personal protective equipment would be worn and so on. We reached agreement, plant by plant. It is unfortunately an industry which is in economic distress. But at least this aspect of its problems has been dealt with and, I think, quite successfully. That's one of the things you can often do when you have a union that is strong enough and has the technical expertise. Fortunately, in that case, the Steelworkers had the industrial hygienists and the engineering capacity to be able to work with the company on the other side so they did not have to simply trust the company's experts.

Dr. Droitsch: I agree with that, but the question of setting the initial standard is a very complicated process and a very hard thing to do.

Moderator: Mr. Kilberg, if you had on your Solicitor of Labor hat, let me ask you what your reaction would be to two things that have been suggested. To caricature it a little bit, one thing that seems to be on the table right now is this: In effect, OSHA or MSHA or the other Department's regulatory agencies would deputize or contract out their enforcement functions to the Mine Workers, or somebody else. Question number one: Is that okay if you were the Solicitor? Question number two: what do you think the reaction would be in the world at large if the Department announced, "We have 145 statutes, but considering the impossibility of enforcing all of them, we are only going to do four in this administration?"

Mr. Kilberg: I think both of those questions are answerable. The answer to the first question is you don't deputize the Mine

Workers. The Mine Workers don't want to be deputized. They would not want that function. What you do is you work with the Mine Workers as well as with industry, and government meets its obligation to set the standards. You leave a role for the parties and you play a role—some of it is cajoling the parties, some of it is threatening the parties so to bring them together to work out the implementation.

With regard to targeting, I think that Dr. Dunlop is absolutely right. You can't enforce 140 statutes well. You don't have the resources. You've got to set priorities. However, I don't think anybody in his right mind would stand up and say, "These are our four regulations and we are going to let everything else slide." You recognize your obligation with regard to all 140, but you have emphasis. You have priorities. The Secretary of Labor can signal as to what he or she considers the problems to be at any given point in time and what the priorities of this administration are. You deal with it in that way.

Moderator: But Dr. Droitsch, hasn't the United States Court of Appeals for the Third Circuit and the D.C. Circuit (among, undoubtedly, others) got into the business of setting your priorities for you?

Dr. Droitsch: They certainly have. Grabbing back that priority setting function is goal number one. Because the Department has not articulated what our priorities are, for instance in OSHA, we get into the problem of being told what to do. Essentially, what we have to do is say, "Here is what's important," and go back to the court and fight that fight.

Moderator: And offer a rationale for it.

Dr. Dunlop: There's got to be a rationale to it, too. I mean it's not just, "I got out of bed today and I'm going to work on regulation number 68 out of 140."

Dr. Droitsch: My suspicion is that the courts would accept that. Well, I have examined, for instance, the petitions to OSHA to do rulemaking. I cannot find one where we have said, "No, we're not going to do a rule," and we were forced to do a rule. What has happened is, and this is interesting, we've said, "Well, maybe we'll do a rule." Then the courts say, "Okay, when are you going to do it?" Then a couple of years later, the courts call us back and say, "Well, how are you coming with that rule?" And a couple of years later they say, "You aren't coming along." Then we say, "Yes we are. We are going to put one out a year from

now." Eventually, the courts get frustrated and say, "You will do the rule."

Mr. Kilberg: It is not generally a good idea to lie to judges.

Moderator: How exactly would this scheme, from the Mine Workers example, or Mr. Kilberg's example of the Steelworkers, help in enforcing the standards against small business? (To Mr. Kilberg) Your experience was not small business?

Mr. Kilberg: No. It was not small business. There are small businesses that are affected by that same standard and were represented in the lawsuit. Unfortunately, they were not, frankly, as forthcoming as big business. They were either not organized or organized by other unions that were not in the same position as the Steelworkers to work out an accommodation. In those instances, the government should have played more of a cajoling role. The government already played its initial role: It set the standard. It set it very, very high, or put the other way, very, very low. It was a difficult standard to meet. The government could have done more to bring the parties together and using the example of the larger company, in this instance, to work with the smaller companies.

Moderator: If I understand you, the government's role in that case would be to bring the small business under the umbrella of the tripartite enforcement scheme, not to have the government inspectors go off on their own after the small enterprises.

Mr. Kilberg: I think the government inspectors are there. It is the threat of government inspection that brings the parties in. There are two ways to deal with it. We can deal with it the hard way in which case we will inspect you and we will go through the litigation process which, win or lose, is going to cost you a lot of money. Or we can see what can be done by way of accommodation. Now we have some models and working from those models, let's see what we can do. That provides the government with a rationale for compromising on its side because it has got a private sector enforcement party, in this case, the United Steelworkers to use as a model. It can only be a model. Plants are different, one from the other, but you can work from it. You can see what compromises were acceptable.

Dr. Dunlop: We did that in the coke oven standard.

Mr. Kilberg: Exactly. That was the model. In the coke oven standard what you did there was, in fact, what we used a few years later.

Moderator: In the coke oven standard, Dr. Dunlop, you set

one standard that was purportedly applicable across the board, but then you accommodated individual reality through enforcement strategy. Is that right?

Dr. Dunlop: Yes. Because often in the standard, one of the realities that has got to be interjected is the differences, not only large and small. In these matters it also very much concerns technological processes that are often delayed. In the coke oven case, the reason the parties were willing to participate in the process is because the government's proposed standards really went to the maintenance processes. If you don't maintain a coke oven, then you get a lot of emissions. But then the parties look at you and say, "You are trying to tell us how to maintain a coke oven." Then they say, "Well, gee, we have got to have something to say about this." They want to participate, and you then have to recognize that an old coke oven or one that is not in perfect repair is a very different kind of application than the latest coke oven ever built.

By the way, in the Brown Lung Case, the difference between the companies was this: The large companies had recently bought modern equipment. They didn't have problems meeting the air conditioning standards. But a lot of the smaller firms had older and more obsolete equipment and this large-small dichotomy is very much interrelated with aging equipment in many environmental standards.

Dr. Droitsch: Absolutely. That is the difficulty in tailoring any regulation when you go out there and discover exactly what the situation is. You throw up your hands because usually the newer and more efficient firms can easily meet these standards. The statute says lowest feasible. There you have standardizing. It's feasible and they're doing it.

Mr. Kilberg: Feasible for whom?

Dr. Droitsch: Yes, feasible for whom and then working with that definition is very complex.

Mr. Kilberg: I think there's a theme, and the theme is one of cooperation. It is cooperation between labor and management, cooperation with government and employer and labor. In an effort to resolve problems, the reason I decry the trend towards litigation is that litigation, by its very nature, is something you do when you don't plan on living with the other party ever again. It is a burn-your-bridges approach. In this world of labor-management relations, you are going to live with the other party. Labor

and management have got to learn to live together. They see each other day by day.

Similarly, the small employer is going to see the government. There's a different reaction. You think of the equal employment opportunity investigator because that investigator will be back. Relationships have to be developed. That is something you are always advising your client when there is a government audit. This is not a one time affair. It may be ten years before you see somebody from that agency, but you will see somebody from other agencies. You have got to develop relationships. We have got to find ways to accommodate our needs. It works, if given a chance.

Moderator: That provokes a question for Mr. Brown as the only official person from a trade union here. When the Labor Department was working on a process of accommodation, not at the enforcement stage, but at the rulemaking stage, called negotiated rulemaking, the initial reaction of one of the key staff members of the AFL-CIO was to be absolutely opposed to it as an alternative process. The rationale, as it was expressed to me for that position of opposition was this: Once you started making deals from the back room, the goal of protecting workers would be sacrificed. But, I think, more important than that was a perception that the litigation process is advantageous to a union because it requires fewer resources to cross-examine the management expert witness on a health standard or safety standard and make a record that drives the standard in a particular way. It requires fewer resources to do that than it does to participate in a joint process. If the Labor Movement as a matter of policy is opposed to these kinds of processes, how do we explore them?

Mr. Brown: I can't speak for the AFL-CIO, nor would I want to, but I think there was, in the late 1960's and 1970's, a belief in litigation. Lawyers went around to set up public interest firms and got results. You can think of any number of situations where they did. But with those victories, and, of course, if you ask me as a lawyer, I am going to want to be able to go in and be able to have a citizen suit at the drop of a hat. Haul in the Secretary of Labor and ask him questions. That is what I am going to want. But litigation creates a very superficial atmosphere and frankly I am sick and tired of it. I think you can get rid of very stark, intolerable conditions in litigation, but I don't think it is any way to run a business. You don't get a consistency of results upon read-

ing the decisions. It is always better to work it out. Now, if that means that you can't always say, "You make a proposal and we'll critique it," then you've got to get in the game.

Mr. Kilberg: But litigation is a tactic, a tool. If it is used that way, it can be helpful. You've got to remember it is a tactic and not to let it control and become the objective. Sometimes you need it because you need to develop a record. Sometimes you use it just because you are treading water. Things will happen, but they have to happen at a certain time in a certain way. I have been involved in a bankruptcy for the last two and a half years. It is frustrating, but certain things have to happen. Sometimes in labor negotiations, there is an understanding that we are going to make an offer and you are going to take it back to your membership. We all know the membership is going to vote it down. Sometimes we need to have that happen. Part of the process is understanding the human relations that go on in negotiations. The key thing to remember is what your objective is and not to allow the litigation to become the objective.

Mr. Brown: For example, it is mind boggling to imagine the resources it would take us and the minor, minor result it would achieve. Litigating is no way to replace active concern for safety inspection.

Moderator: (To the audience) What comments or questions do you have?

Audience Member: What about arbitration?

Mr. Kilberg: I think there is a qualitative difference. For one thing, the grievance procedure is a communication procedure. It is a problem-solving procedure. Arbitration is the same way. Sometimes cases are taken to arbitration and the side that pushes it to arbitration doesn't really want to do to it, but it *needs* to go through the process. It is a means of dispute resolution, but it is done with an expert or professional making the decision, not a group of neutrals who have no understanding of how the parties need to accommodate their differences. Dispute resolution is to be favored. All I am saying is that litigation in the federal or state courts, particularly jury litigation, has always struck me as the worst kind of dispute resolution. It is the kind of dispute resolution you use as a means of last resort. When you have parties that have to live together, then you ought to be looking at the larger picture. Litigation ought to be an element of the larger picture and not the end all of the deal.

Audience Member: Can unions help enforcement against non-union employers?

Mr. Kilberg: No. Because the problem is that the union ought to be dealing with its employers. It ought not to be dealing with somebody else's employer to try to put pressure on the first employer. That doesn't resolve the problem, but circumvents it. Thus, getting rid of the secondary boycott and hot cargo provisions in the National Labor Relations Act doesn't solve anything. All it does is escalate the problem.

Audience Member: Dr. Dunlop, your reference to the differences in bargaining in certain industries. . .would that cause you to make a recommendation to the President-elect in this transition task force in terms of changing the way the Labor Relations Act can deal with that aspect?

Dr. Dunlop: I don't want to duck your question, but I do think it is very important to make the comment that any revision of the labor statutes, in particular the National Labor Relations Act, can be talked about in this forum and in other academic circles and maybe we ought to think about them separately in order of merit. Let me be entirely clear that, as a practical matter, it isn't likely that anyone is going to get the chance to introduce and pass one small change in that statute. You've got a whole lot of people's ideas about a whole lot of issues. Secondly, unless you get a pretty well agreed upon set of changes, I despair of getting any significant legislated changes in the legal framework. In fact, I think it may very well be impossible without either a dramatic change in public opinion or some very skillful legislators and presidents. We've got a log jam, a kind of muddle, in the labor law business that is very serious. I would oppose my labor friends walking into the forum or my management friends walking in to say, "Here is another package of labor law reform." That wouldn't even buy you a cup of coffee in the foreseeable future.

In fact, the only change that I would advocate to the President would be, and I've done it publicly a number of times, to say, "Mr. President, you can make an important change in the labor climate of this country by the following simple act over which you have absolute control. Namely, you should agree not to appoint anybody to high office in the Department or the Labor Relations Board or the General Counsel who does not have the joint endorsement of management and labor."

What I want to leave you with is the notion that I think in the foreseeable future the options of people who talk about labor re-

lations policy and suggest changes in the law in this respect may provide good examination questions or good discourse at forums, but I don't think it has an element of practicality. I am very serious about that.

I also have a second view about it. In this area, labor law is a problem that won't be very attractive politically unless it can be worked out. You would need to get partisan people working on it, and I think there is very little chance of that sort of thing happening.

That's not very responsive to your question. But if you ask me substantively, as you have, I can pick out all kinds of things I would like to do including the notion that these matters ought to be more worked out by industry sectors and less on a general basis. But to do that by legislation. . . maybe someone will come along and do what has happened in the tax law. Nobody thought we could get a tax law through and we did.

Moderator: Now we are paying the price . . . .

Dr. Dunlop: In more ways than one.

Audience Member: What do you do about disagreements within the union?

Mr. Brown: I think the situation we have been talking about assumes a union that is interested in health and safety and which is a worker representative one.

Audience Member: That wasn't my question. My question is that some members of the union might be willing to accept lower compensation or standards in the industry in return for higher compensation or more jobs. A minority of union members might not, however, and if we had a concept where all workers had certain property interests in their health and safety in the workplace, the union could bargain without them being fully represented.

Mr. Brown: Well, how would you act? That is a real problem. For example, in some cases, implementation of a health and safety standard in a coal mine results in the closure of the mine because the geology is just not there.

Mr. Kilberg: That is why you have government. The fact is you cannot always rely on the private parties and that's what makes it a tripartite system. You look to the private parties who can come up with the accommodation, the time schedules, the compromises. But you have got to weigh those compromises against the government's obligation to ensure the occupational health and safety of the employees in fact. Those are not easy

judgments, but the government cannot wipe its hands of it. That's why, even in the example that I gave you earlier, there always was a government industrial hygienist and a government engineer there. True, often we asked them just to be quiet, but they were there and they had to approve everything upon which we agreed.

Moderator: What does Mr. Mitchell have to say about the need for government to protect people against making the wrong choices?

Mr. Mitchell: I don't think government shouldn't be there to protect people from making the wrong choices so long as there is very reliable information. Part of the questioner's comment is, if I can make an assumption here, so you know exactly what your risks of disease or fatality are and our workers would probably say they are willing to take higher risks if that means higher wages. Now, if you have some sort of collective bargaining arrangement and there are several workers, the majority of workers will win and that conflict is irreconcilable. That is just part of life. If they are willing to take higher wages or more jobs and less safety, that is a trade-off. If I were a member of the union or management, I might have my input, but assuming that they do have correct and reliable information, the Mine Workers can make that decision better than I could. I am on the outside.

Dr. Dunlop: In a number of industries, this problem of jobs versus standards arises not only in dealing with government but also in safety and health standards. It arises in the collective bargaining process. When should a firm be required to meet the standards of the industry with respect to wages? When should the union make an exception to the previously bargained standards? You have very sharp differences of opinion between the international union, oftentimes on this issue, and the local people. The local people will say, "Gee, we are quite happy to work for lower wages, or less safe working conditions. It's the only job we've got." The national people will say, "Look we're interested in uniform standards. We live in an industry in which firms turn over very frequently. We are not going to be concerned about industry conditions in the one woman's contracting shop. You have half or a third of them coming in every year and going out." It depends on style and all that. If it takes two million dollars to get into the industry, then the international union is much more likely to consider something less than the standard U.S. Steel is

paying for that reason and so on and on. There are differences within the union's structure on this.

Mr. Brown: We often have situations where the international union opposes the company, MSHA and the local union. Because the local union wants to have jobs, and those people may have all the information in the world but they don't have much of a choice. They are not like consumers. The market does not always work. It doesn't work in health care. The cancer patient doesn't say, "Let me look at the doctors." Someone in Appalachia doesn't say, "Well, I am not willing to cash out the last twenty years of my life so I am going to go work at this other plant," because there *is* no other plant. There is an element of social coercion and the Mine Workers take the position that we would rather you not work than undercut the standards for everyone.